Exhibit 3

Scanned to New York EF on 12-21-10

SUPREME COURT OF THE STATE OF NEW YORK — ~~NEW YORK~~ COUNTY

PRESENT: James A. Yates PART 49

Index Number : 601100/2010
SYNCORA GUARATEE INC.

INDEX NO. _____

vs
JEFFERSON COUNTY

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

STAY PROCEEDINGS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is moot

pursuant to Decision and Order dated December 21, 2010 on Motion Seq. No. 002.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: DEC 21 2010

James A. Yates J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: James A. Yates PART 49

Justice

Index Number : 601100/2010
SYNCORA GUARATEE INC.
VS.
JEFFERSON COUNTY
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER, DATED 12-21-10.

Dated: DEC 21 2010

James A. Yates J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

PRESENT: HON. JAMES A. YATES
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

SYNCORA GUARANTEE INC.	:	
Plaintiff,	:	
against	:	Index No. 601100/2010
	:	Decision and Order
JEFFERSON COUNTY, ALABAMA, JPMORGAN CHASE BANK N.A., and JPMORGAN SECURITIES, INC.	:	Motion Seq. No. 002
Defendants.	:	

Quinn Emanuel Urquhart & Sullivan LLP, New York City (*Jonathan Pickhardt* of counsel), for plaintiff.

Boies, Schiller & Flexner LLP, New York City (*Philip C. Korologos* of counsel), for defendant Jefferson County, Alabama.

Simpson Thacher & Bartlett LLP, New York City (*Mary Beth Forshaw* of counsel), for defendants JPMorgan Chase Bank N.A. and JPMorgan Securities, Inc.

Hon. James A. Yates, J.S.C.

This action arises out of warrants issued by Jefferson County, Alabama ("the County"). The County issued the warrants in order to fund sewer remediation mandated by the Environmental Protection Agency.

The warrants are: the Series 2002-C Sewer Revenue Refunding Warrants, with an original principal amount of $893,500,000, and the Series 2003-B-2, 2003-B03, 2003-B-4, 2003-B-5, 2003-B-6, and 2003-B-7 Sewer Revenue Refunding Warrants, with an aggregate original principal amount of $300,000,000 (collectively, "the Warrants"). Also at issue is a Debt Service Reserve Insurance Policy insuring payments related to the Warrants and certain other warrants issued by the County, up to a principal amount of $164,863,746.40 (the "Surety Bond"). The Warrants consist of two particular types of warrants: auction rate warrants and variable demand warrants. Both types of warrants are variable rate.

In order to hedge its interest rate risk with respect to the variable interest rate warrants, the County entered into a number of interest rate swap agreements with defendants JPMorgan Chase Bank, N.A. ("JPMorgan Chase") and J.P.Morgan Securities, Inc. ("JP Morgan Securities") (collectively "JPMorgan"). The swap agreements allowed the County to exchange its variable interest rate payment obligations under the Warrant for a fixed rate obligation to be paid to JPMorgan. Plaintiff alleges that these swap agreements were an integral part of the entire financing scheme because they permitted the County to issue variable rate warrants (which are more attractive to investors) while still retaining the ability to pay fixed interest rates on those notes. JPMorgan received fees both for underwriting the Warrants and for acting as the County's counterparty under the swap agreements.

Between 2002 and 2004, defendants solicited plaintiff to insure the County's payment obligations under the Warrants. The insurance was sought in order to improve the bond rating of the issuance, and was expected to make the debt more marketable to investors. Insuring municipal debt was a common and expected practice at the time. Plaintiff's due diligence included examination of the Official Statements for the Warrants and several in-person meetings with Jefferson County officials and representatives of JPMorgan at JPMorgan's offices.

Plaintiff alleges that these documents and information included numerous material misrepresentations and omissions. Specifically, they did not disclose that certain payments to politically connected consulting firms in Alabama were used to pay what plaintiff calls "bribes" to Jefferson County officials in exchange for their vote to select JPMorgan as underwriter and swap counterparty in the Warrants issue and swap transactions. Also, plaintiffs allege that the County and JPMorgan misrepresented and/or concealed troubling findings issued by Krebs Consulting ("Krebs Report" or "the Report") that indicated that County's current revenue sources would not be sufficient to meet the debt obligations that plaintiff was being asked to insure.

As a result of this alleged corruption, plaintiff claims, the County's sewer system has been mired in a deep financial crisis. In April 2008, the sewer system failed to generate revenues sufficient to meet the payment obligations due on the Warrants and the County has subsequently defaulted on its payment obligations to the Warrant holders.

Following the County's defaults, plaintiff has been called upon to make a number of payments under the Policies. It has

already paid $109 million in claims under the 2002 Policy, approximately $75 million under the 2003 Policy, and approximately $27 million under the Surety Bond. In addition, plaintiff entered into an agreement with certain holders of the 2003-C warrants to pay $105 million in settlement of current and future claims. Plaintiff estimates future claims obligations in excess of $100 million.

Plaintiff brings this action to recover as rescissionary damages amounts including all of its past and future payment obligations under the Policies, which are estimated to be in excess of $400 million. Plaintiff commenced this action on April 29, 2010, asserting four causes of action: (1) fraud related to bribes; (2) aiding and abetting fraud related to bribes; (3) fraud related to Krebs findings; and (4) aiding and abetting fraud related to Krebs findings.

Defendants move for an Order dismissing the complaint, pursuant to CPLR 3211 (a) (1), (5), (7) and 3016 (b).

I. First and second causes of action are timely

JPMorgan defendants move for an order dismissing the first and second causes of actions pursuant to CPLR 3211 (a) (5) as untimely.

In New York, the statute of limitations for fraud is the longer of six years from commission of fraud or two years from the discovery of fraud. (*see* CPLR 213 [8]). This action was commenced on April 29, 2010. Plaintiff's claims relating to third party payments concern alleged omissions and misrepresentations which took place between 2002 and April 16, 2004 and thus falls outside the six-year limitation period.

JPMorgan defendants also assert that plaintiff's claims were also brought more than two years from the time information about the fraud became available to the public or could be discovered with reasonable amount of due diligence. (defendants' memorandum of law in support of motion to dismiss at 23). In support of its motion, JPMorgan cites several press reports and government investigations that should have put plaintiff on notice of JPMorgan's involvement in the allegedly illegal third-party payments. (*Id.* at 24-25).

However, the nature of the articles and investigations is not such that they makes it dispositively clear either that JPMorgan had any connection to the financial irregularities that County and its officials were being accused of by the SEC nor

that it was making payments to politically connected consultancies for no work performed and purely to facilitate the allegedly illegal third-party payments, which is the gravamen of the plaintiff's complaint.

The first time that the facts concerning JPMorgan's involvement in the alleged kickback scheme conclusively came to light was prior to Larry Langford's trial, in the fall of 2009, just a few months before the filing of the complaint in this action (plaintiff's memorandum of law in opposition to the motion to dismiss at 24). As such, this action was timely commenced.

For reasons stated above, defendant's motion to dismiss plaintiff's first and second causes of action as untimely is denied.

II. Fraud claim

JPMorgan defendants seek to dismiss plaintiff's first two causes of action for fraud related to alleged bribes on the grounds that they fail to state a cause of action.

Under New York law, the elements of a fraud claim are: "(1) misrepresentation or concealment of material fact; (2) scienter; (3) reasonable reliance; and (4) damages." (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003)]. "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant has a duty to disclose material information and it failed to do so." (*Id.*)

JPMorgan defendants seek to dismiss plaintiff's first cause of action on the grounds that defendants never made any affirmative misrepresentation to plaintiff. As such, defendants should only be subject to the fraudulent concealment standard, which plaintiff fails to meet because it cannot make out a duty to disclose between itself and defendants, since they were not parties to the insurance contract between plaintiff and the defendant County.

In addition, JPMorgan defendants argue, plaintiff fails to sufficiently plead the remaining elements of a fraud claim, especially materiality of the information allegedly misrepresented or concealed and scienter.

a. Materiality

JPMorgan defendants argue that plaintiff does not establish this element of the claim because "the Complaint does not allege that JPMorgan had any reason to believe that payments made in connection with the swap transactions... was [sic] material to Syncora" (defendants' memorandum in support of motion to dismiss at 11). Moreover, the amounts of third-party payments made in connection with swap transactions were fully disclosed to plaintiff. As such, they did not alter the warrant-related default risk assumed by the plaintiffs.

Initially, plaintiffs challenge the assertion that third-party payments were made in connection with swap transactions alone. (*see* complaint ¶ 35 [describing a taped telephone conversation on July 15, 2002 where JPMorgan employees discussed payments to County commissioners in exchange for being appointed lead underwriter of the warrants]). Further, there's evidence that the warrant issues and the swap transactions were part of an integrated transaction, structured so that one part anticipated the other. (complaint ¶¶ 25, 57, 59). Plaintiff represents that JPMorgan employees discussed them as such (complaint ¶¶ 25, 36) and references to the swap transactions were made in the Official Statements for the Warrants provided to plaintiff when defendants solicited insurance from it. (complaint ¶¶ 57 [b], 59 [b]).

Morever, plaintiff does not claim that the amounts of the fees were not disclosed to them. The *amount* of the payments is not the basis for this cause of action. Rather, plaintiff contends that it is the *purpose* for which these transfers were made that it finds objectionable. This was not legitimate remuneration to local consulting firms that plaintiff assumed it was when policies were issued. Instead, plaintiff contends that these were bribes and as such, were materially relevant to their determination whether or not to insure the offering.

"Information about bribery is relevant to important questions about the competency of management" because "[m]anagement's willingness to engage in practices that probably or obviously are illegal... may be [a] critically important factor[ ]" to parties looking to conduct business with such an enterprise. (*Roeder v Alpha Indus.*, 814 F2d 22, 25 [1st Cir 1987]). Prudent business persons "may prefer to steer away from an enterprise that circumvents fair competitive bidding and opens itself to accusations of misconduct." (*Id.*)

Here plaintiff insurer could have reasonably concluded that defendants' alleged bribery practices were indicators that the

County's affairs were being mismanaged if decisions were made on this illegal basis, rather than through a rational, revenue-maximizing approach.

JPMorgan defendants' argument that the alleged bribery practices were immaterial, because they represented such a small percentage of the transaction fails as well. "[M]ateriality of criminal activities is unaffected by the extent of the illegal conduct" because "illegal payments that are so small as to be relatively insignificant to the corporation's bottom line can still have vast economic implications" since "they may endanger all of a corporation's business if they are discovered." (*Galati v Commerce Bancorp, Inc.*, 2005 WL 3797764, 5 [D NJ 2005]).

Here, while the County is not a corporation, its reputation for integrity is still important. Should the County's reputation for credit worthiness have suffered as a result of these allegations, the County may have had difficulty conducting all of its financial affairs, including repayment of existing debt instruments insured by plaintiff. This in turn would materially affect the insurability of the Warrants.

b. Scienter

Defendants argue that plaintiff's cause of action for fraud fails because plaintiff does not allege that JPMorgan defendants acted with an intent to defraud, only that they provided plaintiff with information that may have been false and misleading (defendants' memorandum of law in support of motion to dismiss at 17). The applicable standard under CPLR 3016 (b) requires that "the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action where it may be impossible to state in detail the circumstances constituting fraud." (*Aris Multi-Strategy Offshore Fund, Ltd. v Devaney*, 23 Misc 3d 1221[A] [Sup Ct New York County 2009]).

In support of a more stringent standard, defendants cite to several federal cases. However, the federal standard is inapplicable here: "[u]nlike the Second Circuit test which requires a 'strong inference' of fraudulent behavior, all that is required under CPLR 3016 (b) is that the facts alleged 'permit a reasonable inference of' fraud. Moreover, because the element of scienter is most likely to be within the sole knowledge of the defendant and least amenable to direct proof, the requirement of CPLR 3016 (b) should not be interpreted strictly when analyzing scienter allegations in a complaint." (*Id.*)

Here, the plaintiffs "need only allege specific facts from which it is possible to infer defendant's knowledge of the falsity of its statements." (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 99 [1st Dept 2003]). "It is sufficient if plaintiffs allege, by specific, supported factual allegations, that the statements were materially inaccurate and that [defendant] knew it. These allegations may be disputed by contrary evidence at trial, but their weight should not be addressed here." (*Id.* at 100). The facts need to be sufficient so that "it may be inferred that the defendant was aware that its misrepresentations would be reasonably relied upon by the plaintiff, not that the defendant intended to induce the particular acts of detrimental reliance ultimately undertaken by the plaintiff." (*Id.*)

New York courts have found the following allegations sufficient to sustain the scienter element of a cause of action sounding in fraud: knowing provision of false performance data (*see Aris*) and failure to acknowledge irregularities in financial statements (*see Houbigant*). Even under the more stringent federal standard, a "statement concerning income projections made with knowledge of import restrictions that could undercut those projects [was] sufficient to allege scienter." (*Cosmas v Hassett*, 886 F2d 8, 13 [2d Cir 1989] [as described in *Aris*]).

Here plaintiff provided allegations containing sufficient specificity to make out a claim that JPMorgan defendants' statements were knowingly false. Complaint contains allegations that JPMorgan employees discussed the alleged illegal payments with County officials and amongst themselves, but failed to disclose the nature of those payments to the plaintiff. (complaint ¶¶ 33, 35, 38, 52). Furthermore, plaintiff pleads that JPMorgan "directly benefitted from their fraudulent conduct because Syncora's agreement to insure the County's interest and principal payments made the Warrants more marketable to investors... [which allowed] JPMorgan to receive its substantial underwriting and swap fees." (complaint ¶¶ 116, 127, 139, 150).

c. Duty to disclose

JPMorgan defendants argue that the parties had no fiduciary, confidential or other relationship that would give rise to a duty of disclosure upon which a cause of action for fraudulent concealment could be based as these defendants are not parties to

the insurance policies.[1] To the extent that JPMorgan defendants made statements concerning the Warrants, they were not rendered misleading by a failure to disclose payments made at the County's discretion in connection with the swap transactions.

Plaintiff relies on several alternative sources of law to establish that JPMorgan defendants had a duty to disclose the alleged illegal nature of the third party payments to Alabama consultants. Plaintiff argues that JPMorgan defendants owed plaintiff a duty to disclose under (i) federal securities law, (ii) New York State Insurance Law, and (iii) common law "special facts" doctrine.

Plaintiff bases its initial argument for an existing duty to disclose on federal securities law. It argues that if "federal securities laws require disclosure of illegal payments in connection with securities offerings" (plaintiff's memorandum of law in opposition to motion to dismiss at 17) for the benefit of investors, these disclosure duties extend to anyone who relies on the truth of these statements in a different context as well. While the court can see the logic of the plaintiff's argument, it refuses to expand the interpretation of the federal securities laws on so barren a record.

With regard to New York State insurance law, plaintiff argues that Insurance Law § 3105 imposes upon applicant for insurance, or anyone acting "by the authority of" such a person, "an affirmative statutory duty... to disclose all information known to it that would be material to the insurer's decision whether to issue the policy." (plaintiff's memorandum of law in opposition to motion to dismiss at 18) (*see e.g. Lighton v Madison-Onondaga Mut. Fire Ins. Co.*, 106 AD2d 892, 893 [4th Dept 1984] ["If the applicant for insurance is aware of the existence of circumstances which he knows would influence the insurer in acting on the application, he is required to disclose that circumstances to the insurer, though unasked."]). Plaintiff argues that by assisting in preparation of the Official Statements for the Warrants and making statements during meetings, JPMorgan was acting, at least "by authority of" the applicant for insurance, the County.

JPMorgan defendants seek to dismiss this argument as a matter of law, arguing that as a stranger to the insurance

---

[1] JPMorgan Chase, JP Morgan Securities and plaintiff each had contractual relationships with the County, but not each other.

policy, they cannot be considered an applicant for insurance. Regardless of whether this is true or not, genuine issues of material fact exist as to whether JPMorgan defendants can be deemed to have acted "by the authority of" the County, both having put together the Official Statements used by the County to solicit insurance, and assisted with County's presentations to the plaintiff during the time when insurance was being sought. As a result, JPMorgan defendants are not entitled to dismissal of this portion of the complaint on these grounds.

Finally, plaintiff argues that outside the sources of statutory law it cites above, JPMorgan defendants owed it a duty of disclosure under the common law "special facts" doctrine. "Under the 'special facts' doctrine, a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (*Swersky v Dreyer & Traub*, 219 AD2d 321, 327-328 [1st Dept 1996] [internal citations and quotation marks omitted]). Moreover, a party need not be a party to the transaction for the "special facts" doctrine to apply: "a duty to disclose... is not limited to parties in privity of contract when nondisclosure would lead the person to whom it was or should have been made to forego action that might otherwise have been taken for the protection of that person." (*Strasser v Prudential Sec.*, 218 AD2d 526, 527 [1st Dept 1995] [internal citations and quotation marks omitted]).

In determining whether plaintiff has stated facts sufficient to withstand defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) in the instant action, the court bears in mind the rule that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." (CPLR 3026). When determining a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Indus. Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]. "So liberal is the standard under these provisions that the test is simply whether the proponent of the pleading has a cause of action, not even whether he has stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]).

The elements of a fraudulent concealment claim based on the Special Facts doctrine are all sufficiently pleaded in the complaint. Defendants' motion to dismiss the first cause of action for fraud is denied.

III. Aiding and abetting fraud claim.

Plaintiff alleges that the defendants each aided and abetted the others' fraud by "jointly drafting and distributing" to plaintiff "offering and other promotional materials for the Warrants that contained the false representation and which concealed the bribes" that the JPMorgan defendants paid to County Commissioners. (complaint ¶ 128). Plaintiff specifically pleads that these distributions took place on several occasions, August 12, 2002 and March 13, 2003 among them (complaint ¶¶ 128, 151).

"A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance." (*Oster v Kirschner*, 7 AD3d 51, 55 [1st Dept 2010]).

JPMorgan defendants argue that plaintiff fails to make out an aiding and abetting claim because they did not have actual knowledge of the payments made to County commissioners nor that they substantially assisted in the fraud.

a. Actual knowledge

In New York, "actual knowledge need only be pleaded generally". (*Oster v Kirschner* at 55). "The language of CPLR 3016 (b) merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice... it should be sufficient that the complaint contains some rational basis for inferring that the alleged misrepresentation was knowingly made ... Accordingly, plaintiffs here... need only allege specific facts from which it is possible to infer defendant's knowledge of the falsity of its statements." (*Id.* at 57-58.)

Plaintiff does plead that defendants knew about the nature and destination of the payments they were making. In the complaint, plaintiff quotes from conversations between JPMorgan employees, discussing the payments. Plaintiff also pleads that JPMorgan knew of the fraud with regard to bribes:

> "on July 15, 2002, in a taped telephone conversation, LeCroy (JPMorgan employee) told MacFaddin (another JPMorgan employee) that Germany (County Commissioner) and another Commissioner specifically told him that in exchange for their support for JPMorgan's bid to be appointed lead underwriter, JPMorgan would need to make payments to two firms - Gardnyr Michael Capital Inc. and ABI Capital Management - who were allied with those

> Commissioners. In the conversation, LeCroy told MacFaddin that he responded to this request by telling the Commissioners: 'Whatever you want - if that's what you need, that's what you get - just tell us how much.'"

(complaint ¶ 35).

In another conversation, MacFaddin told LeCroy "what we're saying is, it's really [Commissioner] Jeff Germany who is directing us to pay these guys. It's not, we're not paying them because they were our advisor." (complaint ¶ 38). In yet another telephone conversation, LeCroy and MacFaddin joked that the funds transferred to Goldman Sachs were "a charitable donation", "making it perfectly clear that the fees paid to Goldman Sachs did not reflect the provision of any actual services." (complaint ¶ 52).

Plaintiff has alleged sufficiently specific facts (dates, persons involved, exact statements) from which it seems reasonable to infer that the JPMorgan defendants knew that the payments they were making to various Alabama consultancies were not payments for services and would be directed to County commissioners. Therefore, plaintiff, at this stage, has adequately satisfied the pleading requirements for actual knowledge.

b. Substantial assistance

Under New York law, "[s]ubstantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [internal quotation marks and citations omitted]).

JPMorgan defendants argue that at the most, in their interactions with the plaintiff, they failed to act, and therefore plaintiff must plead that they were "required to do so". They argue that "this allegation is insufficient to support a claim of aiding and abetting fraud absent a fiduciary duty or some other independent duty" owed by the JPMorgan defendants to the plaintiff.

Setting aside for a moment that plaintiff denies that JPMorgan defendants are liable for omissions alone, and points to statements that it alleges constitute affirmative

misrepresentations, the Court of Appeals has held that "[a]scertaining the existence of... a [fiduciary] relationship inevitably requires a fact-specific inquiry. " (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009]). Therefore, even if plaintiff is to be held to this heightened standard, it can go forward with discovery in order to establish this claim.

Moreover, "[i]n the context of aiding and abetting, where the primary violations consist of either misrepresentations in, or omissions from, a document, the substantial assistance must relate to the preparation or dissemination of the document itself." (*Morin v Trupin*, 711 FSupp 97, 113 [SDNY 1989]). That is exactly what the plaintiffs allege: that defendants assisted the County in authoring the Official Statements for the Warrants which were then disseminated to the plaintiff (complaint ¶¶ 3, 4, 28, 55-57, 60-62, 128).

Plaintiff has presented several legal theories on which to predicate the existence of a fiduciary relationship. However, an important element in deciding which of them applies will be the factual determination of how much assistance defendants provided to the County in preparing the Official Statements for the Warrants and the extent to which they acted by the authority of the County in meetings with the plaintiff insurer. At this stage in the proceedings, however, plaintiff has adequately alleged the element of substantial assistance.

IV. Krebs Report claims

JPMorgan defendants seek to dismiss the claims for fraud and aiding and abetting fraud with regard to the Krebs Report on the grounds that they could not disclose what they did not know about. According to the JPMorgan defendants, the Report was commissioned and issued to the County, and JPMorgan defendants never received a copy or any of the information contained within it.

Krebs is an independent engineering firm that was hired by the County to evaluate the sources of revenue available to meet the County's payment obligations on the Warrants. (complaint ¶ 31). Between 1997 and 2002, Krebs produced a series of reports, evaluating the financial status of the sewer system, which had been favorable and reassuring about the County's ability to meet its debt obligations and which the County had routinely referenced and disclosed in connection with the issuance of the Warrants." (complaint ¶¶ 72, 81). Some of these findings were incorporated into the Official Statements for the Warrants.

In April 2002, the County requested that Krebs prepare a study to evaluate "the County's current revenue generating structures and to identify any possible new revenues sources and their probable impact on the sewer system revenues. (complaint ¶ 81).

On March 13, 2003 Krebs issued a draft version of the report, and forwarded 20 copies of the final version to the County on March 31, 2003. On April 3, 2003, Krebs also issued a memorandum summarizing the findings from the Report to the County's financing team, which included two employees of the JPMorgan defendants. (complaint ¶¶ 84-85). The Report included "a detailed description of the severe revenue shortfalls that would befall the County if it relied purely on existing revenue sources." (complaint ¶ 86). Specifically, the Report detailed that the system rates could not be raised as the County anticipated to generate additional revenues. (complaint ¶¶ 87-90). The memorandum stated that "debt coverage tests are not being met" and concluded that "simply adjusting the amount of annual debt service will not correct the problem faced by the Commission." (complaint ¶ 101).

On April 8, 2003, defendants made a presentation to plaintiff, during which neither the Krebs Report nor Memorandum were discussed. (complaint ¶ 102). Going forward, the County concealed that it had commissioned Krebs to write this report and its existence. (complaint ¶ 98). The existence of the Report only came to light in 2009 during a receivership action against the County in the United States District Court for the Northern District of Alabama. (complaint ¶ 99).

Plaintiff contends that this was material information because the Warrants were limited recourse obligations, meaning that both the principal and the interest would be repaid only with the revenue generated by the sewer system. Therefore, the ability of the sewer system to generate sufficient revenues to meet the obligations under the Warrants was of the utmost importance to plaintiff. (*see* complaint ¶ 70.) The defendants reassured plaintiff of the sewer system's "financial viability and stability", including that County would be able to "charge sufficient rates and fees to generate the cash needed to make all current and future payments due on the Warrants." (complaint ¶ 71). Often, these reassurance would be supported by reports and certifications from Krebs. (complaint ¶ 72). Of particular importance to plaintiff were the repeated representations that the County would be able to continue raising sewer rates to meet its payment obligations and JPMorgan's assurances that this was a viable model. (complaint ¶¶ 73-80).

JPMorgan defendants rely on several cases to argue that failure to plead receipt is fatal to plaintiff's causes of action based on the Krebs reports. However, as distinguished from *Callisto Pharm., Inc. v Picker* (74 AD3d 545 [1st Dept 2010]), here the claim is not based on "unsupported speculation", but rather on specific transfer of documents. Who received what and when cannot be established on the face of the pleadings and is exactly the kind of inquiry appropriate for discovery.

Moreover, the pleadings contain a large number of factual claims and counterclaims. For example, JPMorgan defendants claim that the April 3 memorandum not only doesn't mention the Krebs Report, it actually "discusses different data." (defendants' memorandum of law in further support of motion to dismiss at 2). They then go on to discuss specific facts and figures being presented in the two documents.

At the motion to dismiss stage, it is inappropriate for the court to determine fine-grained factual questions as a matter of law when they are adequately contested. As such, JPMorgan defendants' motion to dismiss the causes of action relating to the circumstances surrounding the non-disclosure of the Krebs report is denied.

For the reasons stated above, at this prediscovery phase plaintiff has alleged its fraud-based claims with the particularity required by CPLR 3016 (b). Therefore, defendants' motion to dismiss the complaint is denied.

Conclusion

ORDERED that defendants' JPMorgan Chase N.A. and JPMorgan Securities, Inc. motion to dismiss is denied; and it is further

ORDERED that defendants JPMorgan Chase N.A. and JPMorgan Securities, Inc. are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: December 21, 2010

DEC 21 2010

ENTER:

James A. Yates, J.S.C.

James A. Yates

Scanned to New York EF on 12-21-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: James A. Yates PART 49

Index Number : 601100/2010
SYNCORA GUARATEE INC.
vs.
JEFFERSON COUNTY
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER, DATED 12-21-10

Dated: DEC 21 2010

_____ J.S.C.
James A. Yates

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

PRESENT: HON. JAMES A. YATES
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

SYNCORA GUARANTEE INC.,	:	
Plaintiff,	:	
against	:	Index No. 601100/2010
	:	Decision and Order
JEFFERSON COUNTY, ALABAMA, JPMORGAN CHASE BANK N.A., and JPMORGAN SECURITIES, INC.	:	Motion Sequence No. 003
Defendants.	:	

Quinn Emanuel Urquhart & Sullivan LLP, New York City (*Jonathan Pickhardt* of counsel), for plaintiff.

Boies, Schiller & Flexner LLP, New York City (*Philip C. Korologos* of counsel), for defendant Jefferson County, Alabama.

Simpson Thacher & Bartlett LLP, New York City (*Mary Beth Forshaw* of counsel), for defendants JPMorgan Chase Bank N.A. and JPMorgan Securities, Inc.

Hon. James A. Yates, J.S.C.

This action arises out of warrant issues by defendant Jefferson County, Alabama ("the County"). The County issued the warrants ("the Warrants") in order to fund sewer remediation mandated by the Environmental Protection Agency.

Plaintiff Syncora Guarantee, Inc. ("plaintiff") is a monoline insurer[1]. Between 2002 and 2004, it issued three insurance policies for the County's payment obligations under the Warrants: two Municipal Bond Insurance policies effective as of

[1]A monoline insurer provides only financial guarantee insurance, and not property, casualty, life, health, or disability insurance. (*Aurelius Capital Master, Inc. v MBIA Ins. Corp.*, 695 F Supp 2d 68, 71 [SD NY 2010]).

May 1, 2003 and October 25, 2002 and a Debt Service Reserve Insurance policy effective December 20, 2004. The insurance was sought in order to improve the bond rating of the issuance, and was expected to make the debt more marketable to investors. Insuring municipal debt was a common and expected practice at the time.

In its counterclaims, the County alleges that plaintiff "was chosen as the insurer because it had the highest rating" from the relevant rating agencies. (The County's Counterclaims, ¶ 3 at 24). From the County's perspective, "the investment-grade insurance from an insurer with the highest ratings from the rating agencies was critical to the ability to sell the warrants initially, and in the case of Auction Rate Warrants within these series, to maintain the market for the warrants in later auctions." (*Id.* ¶ 4 at 24-25). All the premiums for the insurance have been paid.

Beginning with December 14, 2007, rating agencies have downgraded plaintiff's credit rating. The County alleges that these downgrades "resulted, at least in part, from the overexposure of Syncora in its insured portfolios of residential mortgage-backed securities" and in turn "adversely affected the market for [the County's] Auction Rate Warrants." (*Id.* ¶ 7 at 25).

Based on these allegations, the County brings three counterclaims against the plaintiff: (1) for negligent management of plaintiff's portfolios; (2) for breach of contract to provide "investment-grade insurance"; and (3) for fraud and fraudulent omissions regarding plaintiff's investments and insurance of residential mortgage-backed securities [RMBSs].

Plaintiff moves to dismiss the counterclaims with prejudice in their entirety, pursuant to CPLR 3211 (a) (1), CPLR 3211 (a) (7) and CPLR 3016 (b).

a. The County's breach of contract counterclaims

i. Express contractual obligations

In its answer, the County brings its second counterclaim against the plaintiff for failure to provide investment-grade insurance. Plaintiff moves to dismiss defendant's breach of contract counterclaim on the grounds that the policies do not include a term obligating plaintiff to maintain its credit rating at any level going forward from the issuance of the policies.

It is undisputed that nowhere in the contacts between plaintiff and the County did the plaintiff insurer undertake the express obligation to maintain its ratings. Moreover, in the Official Statements for each Warrant issued by the County, the County discloses to potential investors a possibility that plaintiff's ratings may not remain the same in the following manner:

> "XL Capital's [plaintiff's former name] insurance financial strength is rated 'Aaa' by Moody's and 'AAA' by Standard & Poor's and Fitch, Inc. In addition, XLCA has obtained a financial enhancement rating of 'AAA' from Standard & Poor's. These ratings reflect Moody's, Standard & Poor's and Fitch's *current* assessment of XL Capital's creditworthiness and claims-paying ability as well as the reinsurance arrangement with XLFA described under 'Reinsurance' above.
>
> *The above ratings* are not recommendations to buy, sell or hold securities, including the [Series designation] Warrants and *are subject to revision and withdrawal at any time by Moody's, Standard & Poor's or Fitch's. Any downward revision or withdrawal of these ratings may have an adverse effect on the market price of the [Series designation] Warrants. XL Capital does not guaranty the market price of the [Series designation] Warrants nor does it guaranty that the ratings on the [Series designation] Warrants will not be revised or withdrawn."*

(*see e.g.* Jordan Goldstein's affidavit, exhibit F at 32 [emphasis added]).

While this area of litigation remains fairly new, several federal courts have dealt with similar contractual claims and a consensus has begun to emerge: policy holders cannot assert express contractual claims against monoline insurers for failure to maintain a particular grade or level of credit rating when no such express term exists because doing otherwise would "vary the substantive terms of the contract". (*Confederated Tribes of the Warm Springs Reservation of Oregon v Ambac Assurance Corp.*, 2010 WL 4875657 [D Or 2010]; *see also NPS LLC v Ambac Assurance Corp.*, 706 F Supp 2d 162, 177 [D Mass 2010] ["NPS cannot show that the